

March 27, 2006

Civil Division-Kent County (739-7641)

Mr. Albert G. Porach
220 E. Park Place
Newark, DE 19711

**Re: Freedom of Information Act Complaint
Against City of Newark**

Dear Mr. Porach:

Our Office received your Freedom of Information Act ("FOIA") complaint on February 2, 2006. You allege that the Newark City Council ("the Council") violated the open meeting requirements of FOIA by discussing matters of public business at a meeting on January 9, 2006 without sufficient notice to the public.¹

By letter dated February 9, 2006, we asked the Council to respond to your complaint within ten days. We received the Council's response on February 21, 2006. On February 27, 2006 we asked the Council for additional information, which we received the next day.

¹ You also allege that the City violated Article XXI. Section 32-79(f) of the City Code which provides: "If, after due consideration, a proposal is denied, such proposal shall not be eligible for reconsideration for a period of two years after final action by the council, except upon the favorable vote of three-fourths of planning commission or council." That issue of municipal law is outside our jurisdiction under FOIA.

According to the Council, a private developer, Lang Development Group (“LDG”), wants to build an age-restricted garden apartment on land adjacent to the City (to be called the Villas at Twin Lakes). The Council explained that in order for the project to go forward, four approvals were necessary: “First, the development would require an amendment to the Newark Comprehensive Plan. . . . Second, the proposal would require favorable action by City Council to annex the site into the city and to zone the land ‘AC’(Adult Community). Third, the project would require the approval by City Council of a detailed subdivision agreement which would govern the development of the site once annexed. Finally, the proposal would require the approval by City Council of a special use permit in order to construct a stormwater outfall facility within an open floodway district.”

The City Council noticed those four items for public discussion at a meeting on December 12, 2005 and posted the agenda seven days in advance in compliance with FOIA. According to the Council, at the public meeting on December 12, 2005 “it was noted by Ray Lopata, Newark Planning Director, that the action required with respect to the City Comprehensive Plan . . . was key and a prerequisite to favorable action on the other items. That is to say if Council voted against the required Comprehensive Plan amendment, the remaining actions (annexation, zoning, special use permit, subdivision agreement) would become ‘moot.’”

The minutes of the December 12, 2005 meeting show that the Council voted 3-3 on a motion to approve the amendment to the City’s comprehensive plan (Councilman Kalbacher recused himself). According to the Council, it did not take any further action with regard to the other approvals necessary for the Villas at Twin Lakes development “as a result of the failure [of the amendment to the comprehensive plan] to garner a majority vote.”

The next meeting of the City Council was on January 9, 2006. The City posted a notice and agenda for that meeting seven days in advance as required by FOIA. Item 3 on that agenda listed for comment:

- A. Public (5 minutes per speaker)
- B. University (1) Administration (2) Student Body Representative
- C. Council Members

The minutes of the January 9, 2006 meeting show that during agenda Item 3.C., Councilman Osborne “referred to [LDG’s] request that Council reconsider the Villas at Twin Lakes project sometime in the future and restore it to an agenda. He suggested that they separate the amendment to the Newark Comprehensive Plan into smaller areas.” The minutes show that Councilman Osborne made a motion to “restore this item to a future agenda and that they deal first with the land use plan and reducing the size to two smaller parcels; and that it be done whenever the information was available.” The minutes show that the Council discussed the motion further before voting 6-0 in favor (Councilman Kalbacher recused himself).

The next meeting of the City Council was on January 23, 2006. The Council posted the agenda seven days in advance as required by FOIA. The agenda listed under Item 4: “Items Not Finished at Previous Meeting. A. Request to Place on Future Agenda the Reconsideration of a Comprehensive Plan Amendment.”

The minutes of the January 23, 2006 meeting show that the Council discussed “resubmit[ting] the changes to the Comp[rehensive] Plan to the State Planning Office for their comments, and that it be divided into two smaller areas . . . The Comp[rehensive] Plan amendment would only change the area [LDG] needed for [its] proposed annexation and subdivision.”

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Councilman Osborne made a motion to divide the comprehensive plan into two smaller areas and to send the change to the State Planning Office for their comments. After much further discussion (reflected in pages 7-9 of the minutes), the Council voted 6-0 to approve the motion (Councilman Kalbacher again recused himself).

RELEVANT STATUTES

FOIA requires that “[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, . . . and the dates, times and places of such meetings; . . . 29 *Del. C. §10004(e)(1).*

FOIA defines an “agenda” to include “a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor” *Id. §10001(f).*

LEGAL ANALYSIS

The issue for our determination is whether Item 3.C. on the agenda for the City Council's meeting on January 9, 2006 satisfied the notice requirements of FOIA. Item 3 of that agenda provided for a period of public commentary, first for the public at large, then for the university, and then for "Council Members."

"An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns." *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997)).

In *Att'y Gen. Op.* 03-IB17 (July 31, 2003), during the period on the agenda for "new business," a citizen raised the issue whether one of the members of the town council had forfeited his office by missing three consecutive meetings. We observed that "FOIA requires sufficient specificity in the agenda's description of the items to be discussed to ensure fair notice to the public. Fair notice cannot be imputed from vaguely worded descriptions of agenda items such as 'old business' and 'new business.' Such vaguely worded descriptions invite discussions and actions on any topic without the limitations imposed by FOIA." We recognized, however, "that a public body cannot entirely control what matters citizens may try to raise during a public commentary period at a meeting. But when a citizen raises a substantial matter not specifically noticed for public discussion, there must be a compelling reason why the issue cannot wait for discussion until a later meeting to allow for proper notice under FOIA."

In *Att’y Gen. Op.* 05-IB11 (Apr. 11, 2005), the agenda for a meeting of the city council listed “Council Members Comments.” During that period of the meeting, a member of the council made a motion to refer the issue of pension plan investment strategies to a committee. The council approved the motion 8-1. Again, we recognized “‘that a public body cannot entirely control what matters citizens may try to raise during a public commentary meeting.’ The same holds true for members of the public body, like the members of the City Council.” *Att’y Gen. Op.* 05-IB11 (quoting *Att’y Gen. Op.* 03-IB17 (July 31, 2005)).

We do not believe that the notice requirements of FOIA preclude members of the public or the public body from raising a matter of public business outside the agenda during a period reserved for general comments. A comment period serves an important function by allowing individuals the right to bring matters to the attention of the public body so that they might be considered for future discussion.

Att’y Gen. Op. 05-IB11. In that opinion, we determined that the city council did not violate the notice requirements of FOIA because, when the pension investment strategies issue came up “the Council properly deferred any further discussion on the merits of the issue until it could be noticed to the public in accordance with FOIA.”

The City contends that Councilman Osborne’s motion during the period for Council member comments at the January 9, 2006 meeting “simply asked that the Comprehensive Plan amendment part of the Villas project be placed back on a future Council agenda when certain additional

information became available.”² The minutes of that meeting, however, show that rather than voting on that motion as originally made by Councilman Osborne and deferring any substantive discussion of the Villas at Twin Lakes development, there followed an extensive discussion of the ways in which the Council could accommodate the development going forward by amending the comprehensive plan to reduce the size of the land affected into “two smaller parcels.” In order to bring that about, the Council discussed the need to send the proposed amendment to the State Planning Office for comments. At that point, according to the minutes, Councilman Athey made a “friendly amendment by saying that it was not so much a matter of scheduling this for another Council meeting” but rather a motion “to go back to Dover with the smaller change.” The minutes make it clear, as Councilman “Funk pointed out that the vote was to amend the larger area” not just to reschedule the matter for future discussion.³

Under these circumstances, we determine that the Council violated the open meeting

² The minutes state that “Mr. Osborne referred to Jeff Lang’s request that Council reconsider the Villas at Twin Lakes project sometime in the future and restore it to an agenda.” In *Att’y Gen. Op.* 05-IB11, we noted “that a member of a public body, unlike an ordinary citizen, may be in a position to control what matters of public business are included for discussion at a public meeting by setting the agenda in advance.” We cautioned that “[i]f a public body knows that any item of public interest will be addressed at a meeting, then it cannot claim, in good faith, that the issue arose at the time of the public body’s meeting in order to circumvent the notice requirements of FOIA.” *Id.* (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997)).

³ The City contends that the “motion did not constitute City Council action on any land use issue.” The Chancery Court has rejected the notion that the open meeting law only applies when a public body takes “formal” action. “[A]ction by a public body includes fact gathering, deliberations and discussions, all of which surely influence the public entity’s final decision.” *Levy v. Board of Education of Cape Henlopen School District*, 1990 WL 154147, at p.6 (Del. Ch., Oct. 1, 1990) (Chandler, V.C.). See also *Reeder v. Delaware Department of Insurance*, Mem. Op. at p. 32 & Note 71, C.A. No. 1553-N (Del. Ch., Feb. 24, 2006) (Strine, V.C.).

requirements of FOIA because the Council did not adequately inform the public in advance that it would discuss the Villas at Twin Lakes development proposal at the meeting on January 9, 2006 and a means to resolve the comprehensive plan issue.

We do not believe that any remediation is necessary for this FOIA violation. The agenda for the next meeting of the City Council (January 23, 2006), posted seven days in advance as required by FOIA, listed under Item 4: "Items Not Finished at Previous Meeting: A. Request to Place on Future Agenda the Reconsideration of a Comprehensive Development Plan Amendment." The minutes of the January 23, 2006 meeting show that Councilman Osborne made a motion that "the comprehensive plan be amended by dividing the area into two smaller areas . . . and that change be sent to the State Planning Office for their comments." After an extensive discussion (as reflected in pages 7-9 of the minutes), the Council voted 6-0 to approve the motion.

We believe that the Council cured the January 9, 2006 FOIA violation by noticing the Villas at Twin Lakes comprehensive plan issue to the public seven days in advance of the next meeting on January 23, 2006. The minutes of the January 23, 2006 meeting show that there was a thorough public airing of the issue before the Council voted to divide the area LNG wants to develop into two smaller areas under the comprehensive plan and to send the proposal to the State Planning Office for their comments.

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CONCLUSION

For the foregoing reasons, we determine that the City Council violated the open meeting requirements of FOIA when it discussed the Villas at Twin Lakes comprehensive plan issue at a meeting on January 9, 2006 without adequate notice to the public. We do not direct any remediation for this violation because the Council noticed the issue to the public seven days in advance of the next meeting on January 23, 2006, and there was a thorough public discussion of the issue before the Council voted to send a proposed amendment to the comprehensive plan to the State Planning Office for comments.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

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